UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, vs. JULIO CESAR GARCIA-CUEVAS, Defendant.	Case No. 2:19-cr-00019-MMD-NJK REPORT AND RECOMMENDATION (Docket No. 26)

This matter was referred to the undersigned Magistrate Judge on Defendant Julio Cesar Garcia-Cuevas' motion to dismiss indictment. Docket No. 26. The Court has considered Defendant's motion, the United States' response, and Defendant's reply. Docket Nos. 26, 31, 32.

I. BACKGROUND

On January 22, 2019, a federal grand jury sitting in Las Vegas, Nevada issued an indictment charging Defendant with one count of deported alien found unlawfully in the United States, in violation of Title 8, United States Code, Section 1326. Docket No. 1. The charge alleges that Defendant reentered and remained in the United States "after having been deported and removed therefrom on or about December 2, 2015, April 3, 2016, and July 26, 2017..." *Id*. at 1.

Defendant submits that his November 13, 2015, Notice to Appear ("NTA"), which led to his removal, was insufficient because it did not set a date, place, or time for his removal hearing. *Id*. at 2; Docket No. 26-1 at 2. Defendant submits that, if the original NTA does not include the presiding Immigration Court's address, the Court does not have jurisdiction and a subsequent notice cannot cure this omission. Docket No. 26 at 6-7. As a result, Defendant submits, the Immigration Judge who removed him lacked jurisdiction to do so. *Id*. at 2, 4-5, 9. Defendant

further submits that he need not have exhausted his administrative remedies in the underlying deportation in order to collaterally attack it, as the deportation proceeding was void for lack of jurisdiction. *Id*. at 11. Since the NTA lacked the Immigration Court's address and the date and time of Defendant's initial removal hearing and the documents provided in discovery demonstrated that immigration officials never served him with a curative Notice of Hearing, Defendant asks the Court to dismiss the indictment against him with prejudice. *Id*. at 13.

In response, the United States submits that, on November 13, 2015, immigration officials issued Defendant an NTA after he was convicted of a felony robbery charge in California state court. Docket No. 31 at 2. The United States submits that, on the same date, Defendant signed for receipt of the NTA, which charged him as an alien illegally in the United States and an alien who has been convicted of committing acts which constitute the essential elements of a crime involving moral turpitude, and stated that the date and time of the hearing were to be set later. *Id*. Additionally, the United States submits that, on November 18, 2015, a custodial officer served Defendant with a Notice of Hearing in Removal Proceedings. *Id*.; Docket No. 31-1.[1] The Notice of Hearing in Removal Proceedings, which the United States attached to its response, is dated November 18, 2015, and states that Defendant's case has been scheduled for a hearing before the Immigration Court on December 1, 2015 at 8:00 a.m., at 10400 Rancho Road, Adelanto, California. Docket No. 31-1 at 2. The United States submits that, on December 1, 2015, Defendant appeared before an Immigration Judge, who ordered him removed from the United States to Mexico. Docket No. 31 at 2. The United States further submits that Defendant waived his right

[1] The United States submits that this document was not in Defendant Alien A-File and, thus, had not been provided to defense counsel at the time of the filing of the motion to dismiss. Docket No. 31 at 2 n. 1.

to appeal. *Id*. Additionally, the United States submits that the NTA "filed as a charging document in the immigration court need not contain the time or place of the proceedings." *Id*. at 3. Rather, the United States submits, the rules require immigration officials to include the time, place, and date of the initial removal proceeding "where practicable" and, when this information is not in the initial notice, "the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice…of the time, place, and date of hearing." *Id*. (quoting 8 C.F.R. § 1003.18(b)). The United States submits that the Immigration Judge had jurisdiction over Defendant during his removal proceedings. *Id*. at 5-8. The United States further submits that Defendant's challenge to the validity of the Immigration Judge's removal order does not excuse him from exhausting his administrative remedies and that he has failed to do so. *Id*. at 8-9. Therefore, the United States submits that the initial NTA vested jurisdiction in the Immigration Court, the subsequent Notice of Hearing cured the defects regarding the date, time, and place in the NTA, a valid immigration proceeding occurred, Defendant was lawfully removed to Mexico, and Defendant has failed to demonstrate that he exhausted his administrative remedies. *Id*. at 9. Accordingly, the United States asks the Court to deny Defendant's motion. *Id*. at 10.

In reply, Defendant submits that the initial NTA did not vest jurisdiction in the Immigration Court. Docket No. 32 at 1-2. Defendant further submits that the Notice of Hearing fails to cure the address deficiency because the NTA is a single document that must contain all necessary information; yet, the only address it contains is that of Defendant's residence. *Id*. at 2. Defendant submits that the regulation expressly requires the NTA to contain the address of the Immigration Court where it is filed and, since Defendant's does not, the Immigration Court had no jurisdiction to remove him. *Id*. at 3-4. Defendant further submits that the Notice of Hearing does not cure the defects of the NTA, and that it does not meet the regulatory requirements to be termed a subsequent

NTA. *Id*. at 4-5. Additionally, Defendant submits that the lack of jurisdiction automatically invalidates the removal order; therefore, he asks the Court to dismiss his indictment. *Id*. at 5-6.

II. ANALYSIS

Federal Rule of Criminal Procedure 12(b)(3)(B)(v) allows a defendant to move to dismiss an indictment on the ground that the indictment "fail[s] to state an offense." In considering a motion to dismiss an indictment, a court "must accept the truth of the allegations in the indictment in analyzing whether a cognizable offense has been charged. The indictment either states an offense or it does not. There is no reason to conduct an evidentiary hearing." *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002). "In ruling on a pre-trial motion to dismiss an indictment for failure to state an offense, the district court is bound by the four corners of the indictment." *Id*. A motion to dismiss an indictment can be determined before trial "if it involves questions of law rather than fact." *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir. 1986); *United States v. Jimenez*, 191 F.Supp.3d 1038, 1040 (N.D.Ca. 2016). For this reason, "[g]enerally, Rule 12(b) motions are appropriate to consider 'such matters as former jeopardy, former conviction, former acquittal, statute of limitations, immunity, [and] lack of jurisdiction.'" *Shortt*, 785 F.2d at 1452. A defendant moving to dismiss an indictment bears the burden of demonstrating a factual basis for the motion to dismiss. *See United States v. Ziskin*, 360 F.3d 934, 943 (9th Cir. 2003); *United States v. Lazarevich*, 147 F.3d 1061, 1065 (9th Cir. 1998).

In order to convict a defendant of illegal reentry under 8 U.S.C. § 1326, the United States must establish that the defendant "left the United States under order of exclusion, deportation, or removal, and then illegally reentered." *United States v. Raya–Vaca*, 771 F.3d 1195, 1201 (9th Cir. 2014) (internal quotation marks and citation omitted). "A defendant charged with illegal reentry pursuant to 8 U.S.C. § 1326 has the right to bring a collateral attack challenging the validity of his

underlying removal order, because that order serves as a predicate element of his conviction." *United States v. Ochoa*, 861 F.3d 1010, 1014 (9th Cir. 2017).

To demonstrate that a prior deportation cannot serve as the basis of an indictment for illegal reentry, 8 U.S.C. § 1326(d) requires that a defendant "demonstrate that (1) he exhausted the administrative remedies available for seeking relief from the predicate removal order; (2) the deportation proceedings 'improperly deprived [him] of the opportunity for judicial review;' and (3) the removal order was 'fundamentally unfair.'" *Raya–Vaca*, 771 F.3d at 1201 (quoting 8 U.S.C. § 1326(d)). "To satisfy the third prong—that the order was fundamentally unfair—the defendant bears the burden of establishing both that the deportation proceeding violated his due process rights and that the violation caused prejudice." *Id*. (internal quotation marks, citation, and brackets omitted). Defendant bears the burden of proving all the Section 1326(d) elements. *Ochoa*, 861 F.3d at 1019.

In *Pereira v. Sessions*, 138 S.Ct. 2105, 2113-2114 (2018), the Supreme Court held that "[a] putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a 'notice to appear under section 1229(a) [of the Immigration and Naturalization Act ("INA")],' and so does not trigger the stop-time rule." The question at issue in *Pereira* was whether an NTA lacking this information triggered the "stop-time" rule under 8 U.S.C. § 1229b(d)(1).

After *Pereira* was decided, the Board of Immigration Appeals entertained the issue raised in that case. It found that an NTA which fails to specify the time and place of removal proceedings does not divest the Immigration Judge of jurisdiction, so long as a Notice of Hearing specifying the information is later sent to the noncitizen. *Matter of German Bermudez-Cota*, 27 I. & N. Dec. 441, 441 (BIA Aug. 31, 2018).

On December 14, 2018, the Sixth Circuit found, in *Hernandez-Perez v. Whitaker*, 911 F.3d 305 (6th Cir. 2018), that the decision in *Pereira* has no relevance to the jurisdiction question. Specifically, the Sixth Circuit noted that, notwithstanding its finding that the NTA was defective, the *Pereira* Court did not invalidate the petitioner's underlying removal proceedings. The Court found that "[i]f *Pereira*'s holding applied to jurisdiction, there also would not have been jurisdiction in *Pereira* itself. But the Court took up, decided, and remanded *Pereira* without even hinting at the possibility of a jurisdictional flaw." *Id*. at 313.

Further, on January 28, 2019, the Ninth Circuit addressed whether an NTA that does not include time and date information vests jurisdiction with the immigration judge. *See Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019). The petitioner in *Karingithi* had argued that, "if a notice to appear does not state the time for her initial removal hearing, it is not only defective under § 1229(a), but also does not vest jurisdiction with the [Immigration Judge]." *Id*. at 1160. The Ninth Circuit, however, found that:

> [T]he regulations, not § 1229(a), define when jurisdiction vests. Section 1229 says nothing about the Immigration Court's jurisdiction. And for their part, the regulations make no reference to § 1229(a)'s definition of a "notice to appear." If the regulations did not clearly enumerate requirements for the contents of a notice to appear for jurisdictional purposes, we might presume they *sub silentio* incorporated § 1229(a)'s definition. But the plain, exhaustive list of requirements in the jurisdictional regulations renders that presumption inapplicable here. Not only does that list not include the time of the hearing, reading such a requirement into the regulations would render meaningless their command that such information need only be included "where practicable." The regulatory definition, not the one set forth in § 1229(a), governs the Immigration Court's jurisdiction. A notice to appear need not include time and date information to satisfy this standard.

Id. (internal citations omitted).

The *Karingithi* Court found that the Supreme Court, in *Pereira*, limited its holding to the "narrow" context of the stop-time rule. *Id*. at 1161. The Court found it significant that, while the stop-time statute at issue in *Pereira* specifically cross-referenced the statute defining a Notice to Appear, the regulations regarding an immigration judge's jurisdiction in removal proceedings do not cross-reference that statute. *Id*. The Court therefore found that the regulation controls whether jurisdiction has been vested, not the statute. *Id*. Therefore, the Court found that any attempt to extend the non-jurisdictional ruling in *Pereira* to the jurisdictional issue must fail and, specifically, that "*Pereira* simply has no application [to the Immigration Court's jurisdiction]." *Id*.

On May 22, 2019, the Ninth Circuit found that the stop-time rule is not triggered by service of a defective NTA. *Lopez v. Barr*, 925 F.3d 396 (9th Cir. 2019). The Court found that the statutory requirement that an NTA include time and place information must be met in order to trigger the stop-time rule. *Id*. at 399. Further, the Court found that a subsequent notice of hearing does not cure a defective NTA for the purpose of the stop-time rule. Id. at 399-400.

Here, *Karingithi* makes clear that both *Pereira* and *Lopez* are inapplicable to this case, as they rely upon the statute to determine whether the stop-time rule is triggered and the issue here relies upon the regulation to determine jurisdiction. The Court finds that the NTA and subsequent Notice of Hearing satisfied the regulation. Therefore, as Defendant's jurisdiction argument is based on the reasoning in *Pereira* and *Lopez*, the Court finds that the Immigration Court had jurisdiction during the 2015 removal proceeding and that Defendant's arguments regarding lack of due process in the issuance of his 2015 removal order and the prejudice resulting therefrom

must fail.[2] Accordingly, Defendant's collateral attack on the validity of his underlying removal order must fail as well. Defendant has, therefore, failed to prove the Section 1326(d) elements required to demonstrate that his prior deportation cannot serve as the basis of his indictment for illegal reentry.

III. RECOMMENDATION

Based on the foregoing and good cause appearing therefore,

IT IS RECOMMENDED that Defendant's motion to dismiss the indictment, Docket No. 26, be **DENIED**.

DATED: September 3, 2019.

NANCY J. KOPPE
UNITED STATES MAGISTRATE JUDGE

NOTICE

This report and recommendation is submitted to the United States district judge assigned to this case pursuant to 28 U.S.C. § 636(b)(1). A party who objects to this report and recommendation must file a written objection supported by points and authorities within fourteen days of being served with this report and recommendation. Local Rule IB 3-2(a). Failure to file a timely objection may waive the right to appeal the district court's order. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

[2] In addition, like the petitioner in *Karingithi*, Defendant received actual notice of the date, time, and location of his hearing and, in fact, attended his removal proceeding. Such actual notice also defeats Defendant's arguments regarding due process and prejudice.